Supreme Court, U.S.
FILED
NOV 7 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-383

INTERNATIONAL AMUSEMENTS,
dba, ADULT BOOK AND CINEMA STORE,
DAVID ANDREW PAULY,
STUART LEE, HERSEL RICHARDSON, JR.,
AND KENNETH CLEVELAND,
Petitioners,

vs.

STATE OF UTAH,
Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE ATTORNEY GENERAL FOR THE STATE OF UTAH RESPECTFULLY SUBMITS THE BRIEF IN RESPONSE.

ROBERT B. HANSEN
Attorney General

EARL F. DORIUS
Assistant Attorney General

THEODORE L. CANNON
Assistant Attorney General

Attorneys for Respondent

STATEMENT OF JURISDICTION

Respondent respectfully challenges the jurisdiction of this Court generally to hear the petition here involved. The challenge of jurisdiction is made pursuant to Rule 19, Rules of the Supreme Court, 28 U.S.C., which states that in order for this Court to grant *certiorari* it must be found that the state court decided a federal question of substance in a way not in accord with applicable decisions of this Court. Respondent respectfully submits that no federal question of substance found in the petition here presented was decided in a manner inconsistent or in contradiction with applicable decisions of this Court.

QUESTION PRESENTED FOR REVIEW

Do jury instructions given by the trial court sufficiently instruct on the element of scienter, thereby complying with the First and Fourteenth Amendments to the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
STATEMENT OF THE CASE	1
ARGUMENT	5
POINT I: THE TRIAL COURT SUBSTANTIALLY AND ADEQUATELY INSTRUCTED THE JURY ON THE ELEMENT OF SCIENTER AS CONSTITUTION AND STATUTE REQUIRE	5
CONCLUSION	18

TABLE OF AUTHORITIES

Boyd v. United States, 271 U.S. 104, 107 (1926) 12, 15

Cupp v. Naughten, 414 U.S. 141, 38 L.Ed.2d 368, 94 S.Ct. 396 (1973) 12, 15

Ginsberg v. New York, 390 U.S. 629, 644, 20 L.Ed.2d 195, 88 S.Ct. 1274 (1968) 8, 10

Hanf v. State, 560 P.2d 207 (Okla. Crim. App. 1977) 17

Henderson v. Kibbe, ...U.S....., 52 L.Ed.2d 203, 97 S.Ct. 1730, 1736 (1977) 14, 15, 17

In re Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970) 14, 16

Mishkin v. New York, 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958 (1966) 7, 8, 10

Mullaney v. Wilber, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975) 16

People v. Finkelstein, 9 N.Y.2d 342, 174 N.E.2d 470 (1961) 7, 10

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES—Continued

People v. Kirkpatrick, 343 N.Y.S.2d 70, 295 N.E.2d 753 (1973) 8, 10

Rosen v. United States, 161 U.S. 29, 40 L.Ed. 606, 16 S.Ct. 434 (1896) 6

Smith v. California, 361 U.S. 147, 4 L.Ed.2d 205, 80 S.Ct. 215 (1959) 6-10

State v. Burgun, 4- Ohio App.2d 112, 359 N.E.2d 1018 (1976) 16, 17

State v. International Amusements, dba Adult Book and Cinema Store, David Andrew Pauly, Manager, Stuart Lee, Hersel Richardson, Jr., and Kenneth Cleveland, 565 P.2d 1112 (Utah 1977) 1, 5, 11, 13

State v. Kazda, Utah, 545 P.2d 190 (1976) 13

SECONDARY SOURCES

Rule 19, Rules of the Supreme Court, 28 U.S.C..... i

CONSTITUTIONS AND STATUTES CITED

Utah Code Ann. § 76-10-1204 (Supp. 1977) 1, 2, 10

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-383

INTERNATIONAL AMUSEMENTS,
dba, ADULT BOOK AND CINEMA STORE,
DAVID ANDREW PAULY,
STUART LEE, HERSEL RICHARDSON, JR.,
AND KENNETH CLEVELAND,
Petitioners,

vs.

STATE OF UTAH,
Respondent.

STATEMENT OF THE CASE

The petitioners seek a writ of *certiorari* to the Supreme Court of the United States to review the judgment of the Supreme Court of Utah entered June 13, 1977. In that decision, styled *State v. International Amusements, dba Adult Book and Cinema Store, David Andrew Pauly, Stuart Lee, Hersel Richardson, Jr., and Kenneth Cleveland*, 565 P.2d 1112 (Utah 1977), the Court rejected the claim petitioners now raise and affirmed their convictions for knowingly distributing pornographic material in violation of Utah Code Ann. § 76-10-1204 (Supp.

1977). The petition seeking review of this decision is the subject of this response. (Text of the decision appears in Appendix A. Text of the statuary provision appears in Appendix B).

Each petitioner was separately charged with violating Utah Code Ann. § 76-10-1204 (Supp. 1977). Petitioners were jointly tried in the Second Judicial District Court, in and for Weber County, Utah. The case was tried before a jury which entered a verdict of guilty against each petitioner. In charging the jury, the trial court substantially instructed as to the element of scienter. (Respondent will not repeat the relevant instructions which appear in petitioners' petition, Appendix D). In Instruction No. 8, the court stated that before the jury could find petitioner Pauly "guilty of any of the counts in question, [they had to] find all the elements of that count beyond a reasonable doubt." The court then stated the elements for each of the four counts with which petitioner Pauly was charged, specifically including the requirement that he "knew or should have known" each of the exhibits was in fact illegal pornography. In Instruction 10, the trial court charged that in order to find International Amusements, dba Adult Book and Cinema Store guilty of all four counts, the jury had to find beyond a reasonable doubt that the "corporation's local managing authorities knew or should have known" that the exhibits were in fact illegal pornography. Admittedly, Instruction Nos. 4, 5 and 6 suit the "knew or should have known" language but Instruction No. 10, which applied generally to all the petitioners, required:

> ". . . that every person acting with the mental state required for the conduct of this offense who directly commits the offense or who solicits, requests, commands, encourages or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct."

The trial court further instructed that in reaching its verdicts the jury could rely on circumstantial evidence as well as direct evidence. Instruction No. 20 reads in relevant part:

> ". . . Direct evidence of the commission of a crime consists of the testimony of every witness who, with any of his own physical senses, perceived any of the conduct constituting the crime and which testimony relates what thus was perceived. All other evidence admitted in the trial is circumstantial, and *in so far as it shows any acts, declarations, conditions or other circumstances tending to prove a crime in question, or tending to connect the defendant with the commission of such crime, it may be considered by you in arriving at a verdict.* The law makes no distinction between circumstantial evidence and direct evidence as to the degree of proof required for conviction, but respects each as a reasonable method of proof. *Either will support a verdict of guilty if it carries the convincing quality required by law, as stated in my instructions."* (Emphasis added.)

Finally, in its Instruction No. 24, the court required the jury to consider and construe the instructions:

> "... though numbered separately ... as one connected whole. Each instruction should be read and understood in reference to and as a part of the entire charge and not as though any one sentence or instruction separately were intended to state the whole law of the case upon any particular point. Moreover the order in which the instructions are given has no significance as to their relative importance."

In spite of their contention that the trial court failed to instruct on scienter, petitioners failed to object to this during the trial proceedings, although they did take exception to other matters unrelated to the issue before the Court in the instant case. (The text of these objections appears in Appendix C).

Sufficient circumstantial evidence of scienter was presented during the trial to warrant a finding that the petitioners knew or should have known the character of the materials in question. Included was evidence that a sign was posted on the door of the store indicating that it was for adults only. The sign also stated that there was a *browsing fee* of fifty cents. (Transcript 130). The magazine rack contained magazines showing explicit sex on the covers (Transcript 131). Exhibits 1-P, 2-P, 3-P and 4-P were entitled *Explicit Sex, Hard Act, Hard Action* and *Tongue of Lust*, respectively. Petitioner Pauly had keys to the movie projectors (Transcript 149). From the rest of the evidence presented at the trial and that here summarized, the jury could circumstantially determine that petitioners were guilty of knowingly distributing pornographic material.

Petitioners appealed the judgments of conviction to the Utah Supreme Court, contending:

1. That the trial court erred in its Instruction Nos. 4, 5, 6, 8 and 9 in failing to instruct the jury of the constitutionally mandated and statutorily required element of scienter.
2. That the trial court erred in failing to instruct the jury that the material was to be judged by a statewide standard.
3. That the trial court erred in instructing the jury that in evaluating the conscience of the community, they could consider children as part of the community.

The Supreme Court of Utah rejected these contentions and affirmed petitioners' convictions in *State v. International Amusements, dba Adult Book and Cinema Store, David Andrew Pauly, Manager, Stuart Lee, Hersel Richardson, Jr., and Kenneth Cleveland, supra.*

ARGUMENT

POINT I

THE TRIAL COURT SUBSTANTIALLY AND ADEQUATELY INSTRUCTED THE JURY ON THE ELEMENT OF SCIENTER AS THE CONSTITUTION AND STATUTE REQUIRE.

No doubt exists that the element of scienter is an essential one in prosecutions involving publishing, selling and otherwise distributing obscene materials. The

United States Supreme Court first discussed the existence of the scienter requirement in obscenity cases in *Rosen v. United States,* 161 U.S. 29, 40 L.Ed 606, 16 S.Ct. 434 (1896), stating that where one "knew or had notice at the time of [the obscene material's] contents," the offense was constitutionally complete. *Id.,* 161 U.S. at 41. This Court subsequently addressed the scienter issue in obscenity cases in *Smith v. California,* 361 U.S. 147, 4 L.Ed.2d 205, 80 S.Ct. 215 (1959). In *Smith,* the appellant was convicted of violating a municipal ordinance making it illegal " 'for any person to have in his possession any obscene or indecent writing, [or] book . . . [in] any place of business . . . [where] books . . . are sold or kept for sale.' " *Id.,* 361 U.S. at 148. The ordinance included no element of scienter and therefore "the ordinance was construed as imposing a 'strict' or 'absolute' criminal liability." *Id.,* at 149. On the grounds that making possession for sale of obscene materials a strict liability offense would be tantamount to requiring every seller to inspect every book he sold which would have the effect of inhibiting public access to potentially protected matter, the Court held that a showing of scienter is required in obscenity prosecutions. The Court expressly avoided establishing the kind, quantum or degree of knowledge which would constitute scienter:

> "We need not and most definitely do not pass today on what sort of mental element is requisite to the constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether the contents in fact constituted obscenity need

> be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be. *Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene, but we consider today only one which goes to the extent of eliminating all mental elements from the crime."* (Emphasis added) *Id.,* at 154, 155.

In *Mishkin v. New York,* 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958 (1966), rehearing denied 384 U.S. 934, this Court determined that a New York statute which did not contain any express scienter requirement but had been interpreted as requiring this element in *People v. Finkelstein,* 9 N.Y.2d 342, 174 N.E.2d 470 (1961), satisfied the *Smith v. California, supra,* criteria for constitutionality. In so deciding, the Court looked to the evidence presented at trial indicating the appellant's awareness of the character of the subject matter.

> "Appellant's principal argument is that there was insufficient proof of scienter. This argument is without merit. The evidence of scienter in this record consists, in part, of appellant's instructions to his artists and writers; his efforts to disguise his role in the enterprise that published and sold the books; the transparency of the character of the material in question, highlighted by the titles, covers and illustrations; the massive number of obscene books appellant published,

> hired others to prepare, and possessed for sale; the repetitive quality of the sequences and formats of the books; and the exhorbitant prices marked on the books. This evidence amply shows that appellant was 'aware of the character of the material' and that his activity was 'not innocent but calculated purveyance of filth'." *Mishkin v. New York,* 383 U.S. at 511, 512.

Accord, *Ginsberg v. New York,* 390 U.S. 629, 644, 20 L.Ed.2d 195, 88 S.Ct. 1274 (1968).

A New York statute incorporating a rebuttable presumption that possession of obscene material presumes knowledge has been upheld by the Court of Appeals of New York and without opinion by the United States Supreme Court in *People v. Kirkpatrick,* 343 N.Y.S.2d 70, 295 N.E.2d 753 (1973), appeal dismissed, 414 U.S. 948. After discussing at length the common sense basis for a permissible inference of knowledge from possession, the New York Court of Appeals specifically addressed the issue as it relates to the sensitive First Amendment area:

> "The logic of proof aside, there is an added policy consideration in the use of a presumption in any case involving a limitation on speech or press. This policy consideration concerned the Supreme Court in *Smith v. California,* 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 and it is the concern of the dissenters in this court. That concern is also shared by the majority.
>
> The fear is that any censorship of obscene materials will inhibit the bookseller from open dissemination of only possible obscene material.

> That fear, however, is not to be confused with the holding of the *Smith case* which rejected out of hand a State statute which made the seller of obscene material guilty, regardless of his knowledge or ignorance of the contents. No such statue, of course, is involved here.
>
> Mr. Justice Brennan wrote the majority opinion in the *Smith* case which made clear that the purpose of the holding was not to emasculate prosecution for obscenity. After express disavowal of such an effect the opinion went on to say: 'Eyewitness testimony of a bookseller's persual of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial,' (361 U.S., at p. 154, 80 S.Ct. at p. 219). Notably, the opinion recognized that any obscenity statute applicable to a bookseller will induce some tendency to self-censorship, but also indicated that the decision did not require meeting the problem. The importance of the expressed restraint is of course that otherwise any effective control of obscenity would become impossible.
>
> The 'hardcore' obscenity to which modern efforts are directed is largely of the kind where the authors and publishers are or would be largely anonymous or disguised. It is at some point of distribution that the offense may be uncovered and only sometimes worked backward to the makers of the contraband. In any event, so long as the Supreme Court has not viewed obscenity as beyond legislative control, it behooves the courts to sustain rational efforts at control and not, indirectly on attenuated constitutional spec-

> ulations, to overthrow serially every restrained effort at control. So long as obscenity measures are restricted to the type of material now involved, the social redeeming value qualification retained, and only rebuttable presumptions based on rational connection or probabilities are utilized, the risk to constitutionally protected speech or press is invisible." *Id.*, 343 N.Y.S.2d at 77, 78.

The instant case falls well within these constitutional parameters. Petitioners were charged with knowingly distributing pornographic material in violation of Utah Code Ann. § 77-10-1204. (See Appendix B). This statute is unlike the ordinance in *Smith v. California, supra,* in that the Utah statute *expressly* contains a scienter requirement. *Smith v. California, supra.,* invalidated only the concept of strict liability. Conviction under § 77-10-1204 requires proof that petitioners knew or should have known the character of the materials and the record reveals evidence supporting that element of the offense. Thus, this is not a strict liability offense. Moreover, *People v. Finkelstein, supra; Mishkin v. New York, supra; Ginsberg v. New York, supra;* and *People v. Kirkpatrick, supra;* reflect some flexibility in situations in which the courts imply scienter: proof may be circumstantial as well as direct and presumptions of knowledge from possession are permissible. The case at bar does not go as far as these decisions because not only did the statute expressly require scienter thereby avoiding the need for a forced implication, the prosecution presented proof supporting this element and the trial court substantially instructed as to it also.

The Utah Supreme Court in its decision of this case, *State v. International Amusements, dba Adult Book and Cinema Store, David Andrew Pauley, Manager, Stuart Lee, Hersel Richardson, Jr., and Kenneth Cleveland, supra,* reviewed the trial court record, concluding,

> ". . . that the trial court adequately dealt with the elements of scienter numerous times throughout the trial beginning with the *voir dire* examination of the prospective jurors, again by reading the information which contained the statutory terminology as it pertains to 'knowingly' and finally by way of its entire instructions to the jury and specifically number 10, 20 and 24 dealing with mental state, circumstantial evidence and the integral nature of the instructions, respectively." *Id.*, at 1118.

In reaching this conclusion, the Utah Supreme Court recognized the attempts by the trial court to educate the jury on the elements of the offense. During *voir dire* the trial court explained *inter alia* the principal-agent theory of liability in terms of their *intent*:

> "In other words if A employs B to commit a crime, on behalf of C, they would all be liable if they had the same criminal intent and that is what they are charging here. But you would not be liable unless you intended the commission of the crime charged." (Transcript 87).

Additionally, after the jurors were sworn, the trial court had the clerk read the information (Transcript 125) which contained the scienter element in the definition of the offense. (See Record: Volume 1-18, Record: Volume

2-16 and Record: Volume 3-10). The Utah Supreme Court did not "[search] the record for enough magic words to uphold the instructions" as petitioners argue. Rather, the Court analyzed the trial court's statements throughout the trial in addition to the instructions, realistically appraising the effect of the many components of the trial on the jury. The United States Supreme Court recognized the validity of this kind of analysis in *Cupp v. Naughten,* 414 U.S. 141, 38 L.Ed.2d 368, 94 S.Ct. 396 (1973):

> "In determining the effect of [the presumption-of-truthfulness] instruction on the validity of respondent's conviction, we accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *Boyd v. United States,* 271 U.S. 104, 107 (1926). While this does not mean that an instruction by itself may never rise to the level of constitutional error, . . . *it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." Id.,* 414 U.S. at 146, 147. (Emphasis added.)

Of no little consequence to the Utah Supreme Court was the fact that petitioners failed to object to this alleged deficiency in the instructions:

> "The fact that defendants failed to take exception to any claimed omissions in the court's instructions to the jury also bears upon this appeal. *State v. Kazda,* Utah, 545 P.2d 190 (1976), holds that where a party so fails to object and furnish a proper request to supply any claimed deficiency in instructions he is precluded thereafter from contending error.
>
> There is, of course, an exception to the foregoing principle, and that is, if the giving or failure to give certain instructions is so palpable as obviously to reflect prejudice amounting to denial of due process. However, such is not the case here, and any error that may exist in the court's instructions is not prejudicial error. *The instructions when viewed as a whole, and all of the trial proceedings, clearly cover the element of scienter as it pertains to all defendants." State v. International Amusements, et al.,* at 1113. (Footnotes deleted.) (Emphasis added.)

The United States Supreme Court has never given short shrift to the importance of making timely objections to claimed error:

> "An appraisal of the significance of an error in the instructions to the jury requires a comparison of the instructions which were actually given with those that should have been given. *Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error. It is the rare case in which an improper instruction will justify reversal of a criminal con-*

> *viction when no objection has been made in the trial court." Henderson v. Kibbe,* ....U.S....., 52 L.Ed.2d 203, 97 S.Ct. 1730, 1736 (1977). (Emphasis added.) (Footnotes omitted.)"

The *Henderson v. Kibbe, Id.*, decision, is especially instructive. In *Henderson,* the respondent and his codefendants robbed a man named Stafford and left him in a drunken state and only partially clad in the middle of a road in freezing weather. A speeding driver hit Stafford, killing him. Respondent argued that the driver negligently caused the death, and the prosecution argued that the death was foreseeable and would not have occurred but for the defendants' conduct. Neither party requested the court to instruct on the meaning of the statute requiring the accused's conduct to have caused the death of the victim, and no such instruction was given. As in the case at bar, the trial court read the indictment and the statute and explained the meaning of some of the statutory language. The Court of Appeals for the Second Circuit reversed respondent's conviction, 534 F.2d 493 (1976), on the ground that *In re Winship,* 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970), requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime," *Henderson v. Kibbe, id.,* 97 S.Ct. at 1735, and the failure to instruct on the essential element of causation amounted to fatal error. The United States Supreme Court granted certiorari, ...U.S....., 50 L.Ed.2d 74, 97 S.Ct. 55 (1976) and reversed. The Court concluded that the record evidenced a foundation for the jury finding that the defendants caused the death of Stafford.

This Court then discussed at length the burden on

those seeking to challenge the constitutional validity of a state court's judgment regarding allegedly improper instructions:

> "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process', *Cupp v. Naughton,* 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368, not merely whether '. . . the instruction is undesirable, erroneous, or even "universally condemned."' *Id.,* at 146, 94 S.Ct., at 400.
>
> In this case, the respondent's burden is especially heavy because no erroneous instruction was given, his claim of prejudice is based on the failure to give any explanation—beyond the reading of the statutory language itself—of the causation element. *An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Id.* at 1786, 1787. (Emphasis added.) (Footnotes omitted.)

As in the *Henderson* case, petitioners have the heaviest burden of proving prejudice from instructions which if taken out of context and viewed in isolation omit specific reference to scienter (Instruction Nos. 4, 5 and 6). Respondent submits that the instructions when viewed in context and as a whole as per *Boyd v. United States, supra,* substantially and adequately instruct on the element of scienter.

Respondent does not quarrel with the position that the State must prove beyond a reasonable doubt every element necessary to constitute the crime charged, *In re Winship, supra.* Respondent submits, however, that the State successfully presented sufficient, admissible, probative evidence to satisfy this requirement as to each and every element of the offense charged. Had the trial court received objection as to Instruction Nos. 4, 5 and 6, it might have been able to insert the words "knew or should have known" into each of them, thereby eliminating any slight confusion or lack of emphasis that might have existed in the jurors' minds. Even without this, however, Respondent respectfully but emphatically contends that the trial court educated and sensitized the jury to the scienter element throughout the proceeding and instructed adequately on it in the absence of any objection and the Utah Supreme Court was legally an pdractically correct in so finding.

Petitioners rely on *Mullaney v. Wilbur,* 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975), as analogous to the instant case. In *Mullaney,* this Court held that a Maine law violated due process which required defendant to prove beyond a reasonable doubt that he acted in the heat of passion to achieve a reduction of the charge against him from murder to manslaughter. In the case at bar, petitioners were never required to prove a lack of scienter nor was there any kind of *de facto* lessening of the prosecution's burden by an absence of proof of scienter or by a disregard of it by the trial court.

Petitioners further rely on *State v. Burgun,* 49 Ohio App.2d 112, 359 N.E.2d 1018 (1976), although the ap-

pellant's conviction was reversed on the ground that the *complaint* with which she was charged was fatally defective in that it did not state the element of scienter. An instruction cannot cure a complaint which fails to charge an essential element of the crime. *Burgun* presents an entirely different issue from whether, once properly charged and having heard the trial of a cause, a jury is adequately instructed. Also, *Hanf v. State,* 560 P.2d 207 (Okla. Crim. App. 1977), cited by petitioners, is clearly distinguishable from case at bar on two grounds: (1) reviewing court therein reversed primarily because it found the obscenity statute unconstitutional and it is entirely unclear whether in the absence of that finding the scienter issue alone would have of itself justified reversal, and (2) from the decision it appears that the scienter element was mentioned only once in instruction, and this was outweighed by remarks by the trial court that "whether or not he sold the magazine is the only consideration for the jury to make" and "We're just to assume what is in the evidence, that he sold it." *Id.* at 211, footnote 8. Clearly, neither *Hanf v. State* nor *State v. Burgun, supra,* support the petitioners' claims.

Respondent submits, therefore, that the trial court substantially and adequately instructed on the element of scienter when said instructions are viewed in context and taken as a whole, and that in the absence of objection petitioners are precluded from claiming error. Evidence adduced at trial clearly supported a finding of scienter and the possibility that the jury would have found otherwise with modifications of the instructions given is "too spec-

ulative to justify the conclusion that constitutional error was committed." *Henderson v. Kibbe*, 97 S.Ct. at 1788.

CONCLUSION

For the foregoing reasons and based upon authorities cited, respondent respectfully urges that this Petition be denied.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

EARL F. DORIUS
Assistant Attorney General

THEODORE L. CANNON
Assistant Attorney General

Attorneys for Respondent

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-383

INTERNATIONAL AMUSEMENTS,
dba, ADULT BOOK AND CINEMA STORE,
DAVID ANDREW PAULY,
STUART LEE, HERSEL RICHARDSON, JR.,
AND KENNETH CLEVELAND,
Petitioners,

vs.

STATE OF UTAH,
Respondent.

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the United States Supreme Court Rules, 28 U.S.C., Counsel for Respondent certifies that copies of the Respondent's Brief in Opposition have been served by mail on Arthur M. Schwartz, P.C. and Neil Ayervais, Attorneys for Petitioners, 1500 Western Federal Savings Building, Denver, Colorado; and Steven McCaughey, Attorney for Petitioners, 321 South 600 East, Salt Lake City, Utah, this ..... day of November, 1977.

EARL F. DORIUS
Assistant Attorney General
Attorney for Respondent
236 State Capitol
Salt Lake City, Utah 84114

APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF UTAH

State of Utah,
Plaintiff and Respondent,

v.

International Amusements, dba, Adult Book and Cinema Store, David Andrew Pauly, Manager, Stuart Lee, Hersel Richardson, Jr., and Kenneth Cleveland,
Defendants and Appellants.

No. 14535
FILED
June 18, 1977

Geoffrey J. Butler,
Clerk

HALL, Justice:

The defendants were found guilty of distributing pornographic material in violation of Utah Code Ann., Sec. 76-10-1204 (Supp. 1975). Defendants ask that their convictions be set aside, arguing that the District Court of Weber County erred in its instructions to the jury in three respects: First, that it failed to instruct the jury on the required element of scienter; second, that it failed to instruct the jury that the contemporary community standards by which the jury was to evaluate the material were statewide standards; and third, that it erred in instructing the jury that children could be considered in evaluating the conscience of the community.

The fundamental and most important right of freedom of expression is stated in clear and comprehensive language in the Constitution of the State of Utah, Sec. 1 of Article I:

> All men have the inherent and inalienable right to enjoy and defend their lives and liberties . . . [other rights stated] . . . to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Section 76-10-1204, U.C.A. 1953 provides that a person is guilty of distributing pornographic material when he knowingly engages in the proscribed activities of distributing pornographic material, and Section 1201 (4) thereof defines "knowingly" as "an awareness, whether actual or constructive of the character of material . . ."

Turning now to the first assignment of error, the foregoing constitutional and statutory provisions make it clear that scienter is a necessary element of the crime charged.

A review of the record reveals that the trial court adequately dealt with the element of scienter numerous times throughout the trial beginning with the *voir dire* examination of the prospective jurors, again by reading the information which contained the statutory terminology as it pertains to "knowingly," and finally by way of its entire instructions to the jury and specifically number 10, 20 and 24 dealing with mental state, circumstantial evidence, and the integral nature of the instructions, respectively.

The fact that defendants failed to take exception to any claimed omissions in the court's instructions to the jury also bears upon this appeal. *State v. Kazda,* Utah,

545 P.2d 190 (1976),[1] holds that where a party so fails to object and furnish a proper request to supply any claimed deficiency in instructions he is precluded thereafter from contending error.

There is, of course, an exception to the foregoing principle, and that is, if the giving or failure to give certain instructions is palpable as obviously to reflect prejudice amounting to denial of due process.[2] However, such is not the case here, and any error that may exist in the court's instructions is not prejudicial error. The instructions when viewed as a whole, and all of the trial proceedings clearly cover the element of scienter as it pertains to all defendants.[3]

In regard to the interpretation of Section 76-10-1201 (12), U.C.A. 1953 (Supp. 1975), the trial court properly determined that the same did not require the application of a statewide standard. The wording of the statute clearly establishes a local standard as opposed to a statewide standard by adopting the following language:

> . . . those current standards in the vincinage where an offense alleged under this act has occurred, is occurring, or will occur.

Although the geographic area is not specifically described, the use of the term "vicinage" is clearly lesser in area than the total confines of the State of Utah. Webster

[1] *See also* State v. Villiard, 27 Utah 2d 204, 494 P.2d 285 (1972), which cites a long line of authority, and *see also* State v. Smith, 45 Utah 381, 146 P. 286 (1915).

[2] *See* State v. Cobo, 90 Utah 89, 60 P.2d 952 (1936).

[3] 23A C.J.S. Criminal Law, Section 1321 (1).

defines "vicinage" as an adjacent, neighboring, or surrounding district; a limited area; neighborhood, or vicinity.[4] The trial court logically determined that such was the jurisdictional area from which the jury was drawn. It is not reasonable to view it otherwise, since, as a practical matter, how could any "statewide" standard applied by a St. George, Utah, jury, for example, be the same as a "statewide" standard applied by an Ogden, Utah, jury? This particular point was discussed in *Jenkins v. Georgia*[5] where the Court stated:

> . . . *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to the contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of "contemporary community standards" as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*. [Citing Miller v. California, 413 U.S. 15 (1973)].

As to the equal protection concern that an act could be found to be criminal in one state area and not in another, the case of *Hambling v. U.S.*[6] [sic] had this to say:

[4] Webster's Third New International Dictionary of the English Language, Unabridged, 1961.

[5] 418 U.S. 153 (1974).

[6] 418 U.S. 87 (1974).

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law.

The *Hambling* [sic] case reasonably infers that merely because findings of one jury may differ from another on identical fact situations that equal protection does not suffer and that a jury should be able to determine what effect alleged pornographic material would have on an average person within the community, without regard to age, sex, etc., and this goes to the last point on appeal, i.e., whether the jury instruction which made a reference to children was in error.

It must be specifically noted that the age limits of those persons having access to the alleged pornography was not an issue at trial. Be that as it may, it also must be specifically noted that the instruction in question, as given, was extracted nearly *verbatim* from the statute[1] which reads as follows:

> "In any prosecution dealing with an offense relating to pornographic material or performance, or dealing in harmful material, *the question whether material or a performance appeals to prurient interest in sex shall be determined with reference to average adults or average minors as the case may be.*" (Emphasis added.)

The adoption of this language in the instruction was

[1]Section 76-10-1203 (2) U.C.A. 1953, (Supp. 1975).

clearly an attempt to clarify and define the classification of average person. It certainly was not prejudicial in nature, particularly in view of the fact that age was never an issue at trial. There is no reason to believe that the jurors seized upon this singular reference to minors and solely based their judgment thereon, and it is not reasonable to believe that the trial result would have been different had no such reference been made.

Affirmed.

WE CONCUR:

A. H. Ellett, Chief Justice

J. Allan Crockett, Justice

WILKINS, Justice: (Dissenting)

I respectfully dissent. Addressing first the issue of scienter, it is constitutionally impermissible to construe and apply an anti-obscenity statute so as to hold a defendant strictly liable for prohibited activity regardless of his lack of knowledge of the character of the materials he possesses and sells. The United States Constitution as interpreted in *Smith v. California*, 361 U.S. 147 (1959), will not tolerate such a restriction on the freedom of the press. [sic] The Utah Legislature has spoken definitively in regard to the particular mental state required. Utah Code Ann., Sec. 76-10-1204 states "A person is guilty of distributing pornographic material when he *knowingly* engages in the proscribed activities of distributing porno-

graphic material." (Emphasis added). Section 76-10-1204 (4) defines "knowingly" as "an awareness, whether actual or constructive, of the character of material . . . ." Thus, defendants are correct in their assertion that scienter is a constitutionally and statutorily required element of the crime of which they were convicted.

Defendants, however, failed to take exception to the omission in the jury instructions of the element of scienter or to submit instructions that would cure the defect. As announced in *State v. Kazda*, 545 P.2d 190 (Utah 1976):

> [T]he standard rule is that when a party fails to make a proper objection to an erroneous instruction, or to present to the court a proper request to supply any claimed deficiency in the instructions, he is thereafter precluded from contending error.

The purpose of this rule, of course, is to provide the trial court with an opportunity to correct any defects in its instructions in time for the jury to deliberate properly on the matter.

An error in jury instructions may result in reversal regardless of the party's failure to object, however, if the error is so obvious and prejudicial that it would amount to a denial of due process. *State v. Villiard*, 27 Utah 2d 204, 494 P.2d 285 (1972). It must therefore be determined whether the error in this case was such as to require reversal.

The State has presented an argument that the jury instructions in this case, when taken as a whole, did sufficiently apprise the jury that scienter was a requisite element of the offense with which defendants were charged. Instructions four, five, and six, concerning Defendants Richardson, Lee, and Cleveland, contained no reference to the requisite element of scienter. Instructions eight and nine, however, concerning Defendants Pauly and International Amusements, dba Adult Book and Cinema Store, stated that a verdict of guilty could only be reached if it were found that the Defendant "knew or should have known that such a book was displayed for sale . . ." Additionally, instruction ten stated:

> You are instructed that every person acting with the *mental state* for the conduct of this offense who directly commits the offense, or who solicits, requests, commands, encourages, or intentionally aids . . . shall be liable for such conduct. (Emphasis added.)

Furthermore, although not part of the jury instructions, the Trial Court during *voir dire* pointed out to the jury, in an explanation of principal-agent liability:

> [I]f A employs B to commit a crime on behalf of C, they would all be liable if they had the same criminal *intent* and that is what they are charging here. But you would not be liable unless you intended the commission of the crime charged. (Emphasis added.)

Defendants Pauly and International Amusements argue that the knowledge called for by instructions eight and nine relates to the book's being displayed for sale rather than to the nature of the content of the book. Since the instruction refers to "*such* a book" and goes on to de-

fine when a book constitutes illegal pornography, there is little doubt that the knowledge requirement can fairly be understood to apply to the character of the book, as required. Though a clearer instruction on scienter would be preferable, it cannot be said that the court erred in instructions eight and nine.

As to Defendants Richardson, Lee, and Cleveland, however, I do not believe that the handful of references to "mental state" found when examining the instructions as a whole is sufficient to ensure that said defendants were not denied due process of law. Perhaps under other circumstances the Court's error in failing to instruct on a particular element of crime could be mitigated or eliminated by such corrective references. Because the error in this case impinges on the rights of free speech,[1] however, I hesitate to merely infer that the jury correctly understood the requisite elements of the crime. On this matter of scienter, I believe it must explicitly be brought to the jury's attention that a defendant cannot be found guilty unless ". . . he knowingly engages in . . . distributing pornographic material".

The second issue raised by defendants on appeal is whether or not the jury should have been instructed that statewide contemporary community standards were to be used in evaluating the materials. In *Miller v. California*, 413 U.S. 15 (1973), the United States Supreme Court indicated that a nationwide standard was not constitutionally required, and it approved the statewide standard applied in California. In *Hamling v. United States*, 418

[1]Utah Const., Art. 1, Sec. 1; U.S. Const. Amend. I.

U.S. 87 (1974) and in *Jenkins v. Georgia*, 418 U.S. 153 (1974), the Court made clear that *Miller* did not require a statewide standard to be applied, and it left to the states the ultimate decision as to what "community" standards should be used to evaluate allegedly obscene materials. The Court also expressly approved of the trial court's instructions in *Jenkins*, which directed the jurors to apply "community" standards without having specified the "community" in precise geographical terms.

Utah Code Ann., Sec. 76-10-1201 (12) defines contemporary community standards as "those current standards in the vicinage where an offense alleged under this act has occurred . . ." and the District Court closely adhered to this definition in instructing the jury. This Court is called upon, for the first time in this State, to determine if "community" or "vincinage", must be interpreted to refer to the state as a whole. As mentioned above, the U.S. Supreme Court does not mandate such an interpretation. The Utah Constitution, however, in Article I, Sec. 24, states that "all laws of a general nature shall have uniform operation." The laws enacted by the Utah State Legislature to prohibit the distributing of pornographic and other harmful materials are surely "of a general nature", no less or more so in one part of the State than in another. Therefore the effect to be given these laws must be uniform throughout the State. To convict a defendant of distributing pornographic materials in one part of the State by applying strict local community standards while acquitting a similar defendant in another part of the State because more lenient community standards prevailed would constitute a denial of equal protection of law. Therefore,

I believe that the "contemporary community standards" to be applied, in determining whether the average person would deem the material in question pornographic, should be statewide in scope.

The third issue raised by defendants is whether the District Court erred in instructing the jury to consider children in evaluating the conscience of the community, which instruction stated:

> In this case . . . you are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious . . . men, women and children.

Utah Code Ann., Sec. 76-10-1203 (2) (Supp. 1975) provides:

> In any prosecution dealing with an offense relating to pornographic material . . . the question whether material . . . appeals to prurient interest in sex shall be determined with reference *to average adults or average minors as the case may be.* (Emphasis added.)

The State argues that this language can be read to include children in the determination of the "average person" to be affected by the material. This misinterprets the statute, which indicates rather that where materials are made available to minors their impact on the "average minor" is to be evaluated. There is no evidence in the record that the materials here involved were made available to minors. If the jury did consider the impact of the material on children as well as on adults, it is clear that a finding that the material was pornographic could be reached much more readily than if its impact on adults alone was considered.[1]

I cannot say that such an error was harmless.

This case should therefore be reversed and remanded for a new trial.

MAUGHAN, Justice, concurs in Justice Wilkins' dissent.

---

[1]Our statute, § 76-10-1203 (2), supra, recognizes a distinction between adults and minors concerning what "appeals to prurient interest in sex". The United States Supreme Court — and other courts — recognize along this vein that minors may be accorded a more *restricted* right than adults to judge what material they may read or see. See Ginsberg v. New York, 390 U.S. 629 (1968); Erznoznick v. City of Jacksonville, 422 U.S. 205 (1975); and State v. Seigel, 139 N.J. Super. 373, 354 A. 2d 103 (1975).

APPENDIX "B"

76-10-1204. Distributing pornographic material.—(1) A person is guilty of distributing pornographic material when he knowingly:

(a) Sends or brings any pornographic material into the state with intent to distribute or exhibit it to others; or

(b) Prepares, publishes, prints, or possesses any pornographic material with intent to distribute or exhibit it to others; or

(c) Distributes or offers to distribute, exhibits or offers to exhibit, any pornographic material to others; or

(d) Writes, creates, or solicits the publication or advertising of pornographic material; or

(e) Promotes the distribution or exhibition of material which he represents to be pornographic; or

(f) Presents or directs a pornographic performance in any public place or any place exposed to public view or participates in that portion thereof which makes it pornographic.

Each distributing of pornographic material, as defined in this subsection (1) is a separate offense under this section. A separate offense shall be regarded as having been committed for each day's exhibition of any pornographic motion picture film and for each day in which any pornographic publication is displayed or exhibited in a public place with intent to distribute or exhibit it to others.

(2) Each separate offense under this section is a class A misdemeanor punishable by a minimum mandatory fine of not less than $100 plus $10 for each article exhibited up to the maximum allowed by law and by incarceration, without suspension of sentence in any way, for a term of not less than seven days, notwithstanding any provisions of Section 77-35-17.

(3) Where a defendant has already been convicted once under this section, each separate further offense is a felony of the third degree punishable by a minimum mandatory fine of not less than $1,000 plus $10 for each article exhibited up to the maximum allowed by law and by incarceration, without suspension of sentence in any way, for a term of not less than thirty days, notwithstanding any provisions of section 77-35-17.

History: C. 1953, 76-10-1204, enacted by L. 1973, Ch. 196, § 76-10-1204; L. 1975, ch. 49, § 4; 1977, ch. 92, § 5.
Compiler's Notes.

The 1975 amendment substituted the present language of subsecs. (2) and (3) for the language of former subsec. (2) which read: "Distributing pornographic material is a class B misdemeanor; provided, however, that any person who is twice convicted under this section shall be guilty of a class A misdemeanor, and any person who is convicted three or more times under this section shall be guilty of a felony of the third degree."

The 1977 amendment inserted the paragraph which follows subd. (1) (f).

Cross-References.

Distribution and exhibition of motion picture films, 76-10-1216 et seq.

Collateral References.

Obscenity—7.

67 C.J.S. Obscenity § 7.

50 Am. Jur. 2d 477, Lewdness, Indecency, and Obscenity § 20.

Poronshops or similar places disseminating obscene materials as nuisance, 55 A. L. R. 3d 1134.

APPENDIX "C"

MR. FLORENCE: The Defendants except to the instruction which I have numbered seven, which refers to the Defendant David Andrew Pauly and the element that must be found before he can be convicted and particularly except to the provision of that portion of paragraph 1 which says that he was the corporation. They must find that he was the manager of the corporation and knew or should have known that such a book was displayed for sale.

I suggest that does not conform to the law and the standard in the later instruction with respect to responsibility of parties and the fact that they must solicit, request, demand, encourage, intentionally aid another to engage in the criminal conduct with the same kind of criminal intent.

The same exception will be taken with respect to the instruction on International Amusements for the same reason and the same language that the corporation's local managing authority knew or should have known. Not only do we object to the knew or should have known language, but also restricting it to local managing authority is not being consistent with the later instruction which says that it must be a high managerial agent.

Instruction No. 11, in my instructions with respect to International Amusement and their conduct which will constitute an offense. I suggest the court is not limited totally to a high managerial agent, or as in my requested instruction No. 4, the board of directors, both of which

comes [sic] out of the Utah State law and is much more liberal than is permitted by the Utah State law.

The defendants further except to the limitation on their requested instruction No. 6 with respect to the affirmative defense and excepts particularly to the court's additional language making that defense only available if the sale was to the person in question was intended by the sales person.

The defendants further except to the portion of the instruction which starts, the test is not whether it would arouse sexual desires and particularly to that last paragraph in that instruction which says that in determining the common conscience of the community that they are to consider the community including young and old men, women and children.

I suggest that is not the test in considering community standards. I suggest by the law it is restricted to adults, that there is a different standard entirely when referring to children and unreasonably and improperly misleads the jury as to what their responsibilities are and the standards that they must adopt in considering whether or not these materials are offensive to community standards.

That's all.

(Tr. 171-173).